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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No.....

PERCY McINTIRE, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled case on December 13, 1954.

CITATIONS TO OPINIONS BELOW.

The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, infra, p. 15 R. 77-83, is unreported.

JURISDICTION.

The judgment of the Court of Appeals for the Tenth Circuit was entered on December 13, 1954, R. 84. Rehearing was denied on December 27, 1954, R. 95. The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254 (1). Amendment IV, Constitution of the United States.

QUESTION PRESENTED.

Lower court erred in overruling petitioner's motion to suppress evidence, in that, the arrest was without probable cause and the evidence obtained by search of jeep inadmissible; the State and City officers were acting in cooperation with Federal officers and pursuant to a common practice by which Federal officers adopted and prosecuted in Federal Courts offenses which said State and County officers discovered in their operations.

STATUTES INVOLVED.

The statutory provisions involved are Sections 2810; 2834; 2831; 2434; and 2803 of Title 26, U.S.C. They are printed in Appendix A, infra pp. 11-15.

STATEMENT OF CASE.

The petitioner and others were indicted (R. 2-3) for a violation of the Internal Revenue laws of the United States of America, and petitioner was convicted by a jury upon a plea of not guilty and sentenced to serve three years in the custody of the Attorney General (R. 5), and from that judgment and sentence petitioner perfected his appeal (R. 5).

On the night of February 19, 1953, about 7:30 or 8:00 o'clock, petitioner was arrested at a farm house about four miles west of the City of Muskogee, Oklahoma, on U. S. Highway 62 (R. 8-11). When he drove up to the house in a Ford jeep upon which were sideboards about four feet high with an end gate about the same height, it was raining, and as he approached the house he turned his lights off and it was dark. Petitioner stopped near the porch and left the engine running and made about two steps on the front porch when the State Officer and a policeman ran out of the house and threw a flashlight upon petitioner's face and told him he

was under arrest (R. 8-11). Petitioner was taken into the house by the officers, and Deputy Sheriff Allan Marlow said, "Percy, you are the last person I would figure to be out here." The officers had searched the jeep and found a number of empty jugs, and Deputy Sheriff Marlow asked petitioner what he was doing with the jugs and petitioner told him that he had brought them over to the boys who were working. There were four cartons containing sixteen one-gallon empty jugs. The cartons were about one foot high and were closed so that their contents could not be seen until the cartons were opened. They were in the bed of the jeep which stood about three feet off of the ground and were protected from view by the sideboards. The sideboards were four feet high and one could not see the cartons without getting inside the jeep.

About 3:00 o'clock in the afternoon, Policeman Lynn Etchison and another had discovered a 100-gallon still in the farmhouse, set up and in operation making whiskey. There were also 77 barrels of whiskey mash, a 50-gallon barrel about half full of untaxed whiskey. The still was unregistered (R. 25-28).

When petitioner was arrested (R 11), Policeman Bill Green told him that his case would be turned over to the Federal Government. Sheriff Sypert testified (R 19-34) that many cases involving the operation of illegal stills during his term of office had been turned over to the Federal Government; that next morning after petitioner's arrest Police Officer Green called him about turning the case over to the Federal officers, and shortly thereafter Tom Graves, local agent of the Alcohol Tax Unit, got in touch with him relative to taking over the case, and on the following day, Kenneth G. Pressley, Agent of the Alcohol Tax Unit, came over to his office and processed the case for prosecution in the United States Court (R 19-20-21).

REASONS FOR GRANTING THE WRIT.

1. *Arrest of Petitioner Was Without Probable Cause.*

Petitioner urges that he was arrested without probable cause, and therefore, the subsequent search was illegal and the evidence obtained by the search was inadmissible. The Court of Appeals based the decision upon the proposition that the arrest of petitioner was legal, and therefore, the search incident to the arrest was reasonable. Also, the decision below was based upon the Oklahoma Laws of Arrest, Title 22, Okl. St. Ann. Section 196. R. 81.

The operation of a whiskey still in Oklahoma is a misdemeanor. Such being the case, we must determine under the facts and circumstances in this case if the Sheriff and his deputies, and the State police officers had probable cause to arrest petitioner. Otherwise stated, was the petitioner committing a misdemeanor in the presence of State officers?

Without a doubt the testimony shows there was a still operation in progress when the State officers came to the farm house without a proper warrant for search and seizure.

Some time about 10:00 o'clock on the night of the arrest, the petitioner approached the house in an unlighted jeep. Petitioner parked his jeep near the front porch and removed himself from the jeep and stepped up on the front porch. There was some vague testimony as to whether or not the petitioner did anything except get out of the jeep and step onto the front porch, and at that time, Deputy Sheriff Marlow and Police Officer Etchison stepped out on the front porch and arrested petitioner. From such testimony, can we conclude legally that Deputy Sheriff Marlow and Policeman Etchison had probable cause to believe petitioner to be committing a misdemeanor? Petitioner urges that no such conclusion can be reached without doing vio-

lence to the Oklahoma law. Petitioner suggests that the Deputy Sheriff and Policeman put him under arrest for the purpose of making an exploratory search of the jeep. Deputy Sheriff Marlow had to use a flashlight and get in the jeep to find the empty glass jugs (R 24). Lynn Etchison, police officer, testified that he did not know whether petitioner had unloaded the jugs on the front porch (R 38).

The State and City officers, from their precipitate actions at the time of the arrest of petitioner, would have arrested any person who came to the farm house that night, and would have searched any vehicle that approached the house that night. Then they would have justified their search by saying that they had probable cause to believe any person approaching the house was guilty of committing a misdemeanor in their presence. Such is the practice of State and City officials when they are cooperating with Federal officers in cases of the illicit manufacture of whiskey.

Petitioner should not have been arrested merely because of his proximity to the illegal operation, but the officers must have some facts apparent which would lead a reasonable man to believe that petitioner was committing a misdemeanor in their presence. Petitioner believes that the Court of Appeals misinterpreted the provisions of the Oklahoma law, Title 22, Okl. St. Ann. Section 196. R 81, which provides,

> "A peace officer, may without a warrant arrest a person; 1. For a public offense, committed or attempted in his presence. 2. When the person arrested has committed a felony, although not in his presence . . ."

The petitioner desires to emphasize that *an officer cannot arrest a person on suspicion of committing or attempting to commit a misdemeanor. The misdemeanor or attempt must actually be committed in the presence of the officer.*

In this case the State and City officers at the time of the arrest did *not* know of any act or attempt on the part of the petitioner which constituted a misdemeanor. The petitioner had merely driven up to the house in a jeep with the lights off, and stepped up on the porch. The officers were inside the house in the dark and had not even seen the petitioner until they threw a flashlight in his face. Clearly this arrest was not authorized by the statutes of the State of Oklahoma.

The Criminal Court of Appeals in *McDonald* v. *State*, 13 P. (2d) 213, in construing this provision of law upholds the petitioner's contention. Here the Court said:

> "The contention is made that the arrest was unlawful, the subsequent search of the automobile in violation of defendant's constitutional rights, and the evidence obtained thereby inadmissible. The right of a peace officer to arrest without a warrant is limited to the grounds enumerated in sections immediately following. Except as authorized by these statutes, an arrest without a warrant is illegal. *Graham, et al.* v. *State*, 31 Okl. Cr. 125, 237 P. 462; *Condron* v. *State*, 31 Okl. Cr. 130, 237 P. 465; *Taylor* v. *State*, 36 Okl. Cr. 431, 255 P. 157; *Matthews* v. *State* (Okl. Cr. App.) 282 P. 180; *Wallace* v. *State* (Okl. Cr. App.), 294 P. 198, 199."

In the latter case it was said: "It is well settled that, if an arrest is unlawful, the incidental search of the person * * * arrested is likewise unlawful. *Weeks* v. *U. S.*, 232 U. S. 383."

What constitutes probable cause justifying an officer to arrest without a warrant has been clearly stated by this Court in the case of *Pearson* v. *U. S.*, 150 F. 2d 219. The third syllabus in the opinion states the rule thus:

> "'Probable cause' justifying a search by an officer without a warrant exists where facts or reasonable

inference deducible therefrom should lead a reasonably prudent and intelligent person to conclude that there is good ground to believe that law is being violated. U.S.C.A. Const. Amend. 4."

In the body of the opinion the Court uses the following language:

"What, then, are the facts in this case from which probable cause must be found? They can be briefly stated as follows: Two agents of the Alcohol Tax Unit saw an Oklahoma car parked in front of a liquor store in Fort Smith, Arkansas. They saw two men—one of whom they recognized as a bootlegger, although they mistook his identity—come out of the liquor store, enter the car and drive away. Later they saw this same car drive along the highway in Oklahoma. Is this sufficient to constitute probable cause to justify them in believing that the car was being used in the illegal transportation of liquor into Oklahoma? We think not. * * *

"If the facts in this case permit the legal conclusion that there was probable cause to believe that appellant was transporting liquor into Oklahoma in violation of the federal law, it must be drawn from the fact that his companion had the reputation of being a bootlegger. If that is sufficient, then any time an agent for the Alcohol Tax Unit sees a known bootlegger come out of a liquor store, enter a car and drive across a state line into dry territory, he is justified in stopping him and searching him and his car, without a warrant.

"It is our conclusion that there is complete failure of proof to establish such probable cause as would justify a search of this car at the place and time it was searched without a warrant. The trial court erred in failing to sustain the motion to suppress the evidence."

2. *State Officers Were Cooperating With Federal Officers to Obtain Inadmissible Evidence for Federal Prosecution.*

The petitioner further urges that the evidence in this case all points to the conclusion that the members of the Sheriff's force and the City Police, from the inception of the case to its conclusion, were operating in cooperation with the Federal officers with the understanding that any evidence obtained by them would be turned over to the officers of the Federal Government.

Oklahoma is a dry state. The operation of a whiskey still in Oklahoma is a violation of the laws of the State, as well as the laws of the United States of America. State and City officers soon learn that evidence obtained by them acting alone in violation of the laws governing searches and seizures, is admissible in prosecution in the United States Courts, regardless of the unlawful and unwarranted manner in which it is obtained. This explains the testimony of Sheriff Sypert that many cases made by his office have been turned over to the Federal Government for prosecution.

The raid in this case was planned by the police of the City of Muskogee, although the house involved was four miles from the city limits, and where the police had no jurisdiction or authority to make an arrest. Policeman Bill Green, in company with an agent of the Alcohol Tax Unit, a day or two prior to the arrest of the petitioner, investigated the premises around the house where the arrest was made, checking the gas meter. This could only have been for the purpose of seeing whether the amount of gas that had been used would correspond to that used in ordinary family consumption, or whether a greater amount of gas had been used, such as would indicate the operation of a still.

After the investigation by Officer Green and the Federal Officer, the Government officials stepped out of the picture and only came back in immediately after the arrest of the petitioner.

On the night of the arrest the police officer came to the jail and invited the Sheriff and his deputies to accompany him out to the premises involved in the case. The police officers had with them a search warrant, which they had no authority to execute at such premises. Immediately after the arrest of petitioner by police and deputy sheriff, Policeman Bill Green told petitioner that the case would be turned over to the United States Courts. The next morning, Policeman Green contacted the Sheriff's office relative to turning the evidence over to the Federal Officers, and shortly thereafter Thomas W. Graves, senior officer in the office of the Alcohol Tax Unit at Muskogee, contacted the Sheriff's office and sent over Investigator Kenneth G. Pressley, who processed the case for the Government.

Petitioner urges that under this state of facts, the police officers and members of the sheriff's force were bound by the same strict rules that bind Federal officers so far as their testimony is concerned in this case. *Gambino* v. *United States*, 275 U. S. 310; *U. S.* v. *Butler*, 156 F. 2d 305. Under these strict rules, the arrest of petitioner was without probable cause, and the evidence obtained by virtue of the search incident to said arrest, should have been suppressed by the trial court.

The admission of this testimony was prejudicial in the extreme to the case of the petitioner. The principal other evidence in the case against petitioner is the testimony of co-defendant, George Montgomery (R 47-64). George Montgomery by his own testimony was an accomplice in the case; further, he had been convicted of perjury, man-

slaughter and two other offenses, for all of which he had served time in an institution. His admissions at the time of his arrest that he was the sole owner of the still involved in the case also materially weakened the testimony involving petitioner. Without the evidence obtained by the City and State officers in searching the jeep and finding the empty jugs contained therein, the testimony of Montgomery would have been virtually without corroboration, and it is altogether improbable that the jury would have found petitioner guilty.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

C. A. SUMMERS,
Counsel for Petitioner.

DOUGLAS GARRETT,
CLAUDE GARRETT,
Of Counsel.

APPENDIX A.

STATUTES INVOLVED.

Section 2810, U.S.C.—REGISTRY OF STILLS.

(a) *Requirements.* Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; one of which statements shall be retained and preserved by the collector, and the other transmitted by him to the Commissioner. Stills and distilling apparatus shall be registered immediately upon their being set up.

Every still or distilling apparatus not so registered, together with all personal property in the possession or custody, or under the control of such person, and found in the building, or in any yard or inclosure connected with the building in which the same may be set up, shall be forfeited.

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500 and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years.

Stills and distilling apparatus set up at refineries for the refining of crude petroleum or the production of petroleum products and not used in the manufacture of distilled spirits are not required to be registered under this section.

Section 2834, U.S.C., MASH, WORT, AND VINEGAR; VINEGAR FACTORIES.

No mash, wort, or wash, fit for distillation or the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; and no mash, wort, or wash so made and fermented shall be sold or removed from any distillery before being distilled; and no person, other than an authorized distiller, shall, by distillation, or by any other process, separate the alcoholic spirits from any fermented mash, wort, or wash; and no person shall use spirits or alcohol in manufacturing vinegar or any other article, or in any process of manufacture whatever, unless the spirits or alcohol so used shall have been produced in an authorized distillery and (except in the case of vinegar) the tax thereon paid. Every person who violates any provision of this section shall be fined for each offense not less than $500 nor more than $5,000, and be imprisoned not less than six months nor more than two years. Nothing in this section shall be construed to apply to fermented liquors, or to fermented liquids used for the manufacture of vinegar exclusively. But no worm, goose-neck pipe, conductor, or contrivance of any description whatsoever whereby vapor might in any manner be conveyed away and converted into distilled spirits, shall be used or employed or be fastened to or connected with any vaporizing apparatus used for the manufacture of vinegar; nor shall any worm be permitted on or near the premises where such vaporizing process is carried on.

Nor shall any vinegar factory, for the manufacture of vinegar as aforesaid, be permitted, except as provided in Section 2835, within six hundred feet of any distillery or rectifying house. But it shall be lawful for manufacturers of vinegar to separate, by a vaporizing process, the alco-

holic property from the mash produced by them, and condense the same by introducing it into the water or other liquid used in making vinegar.

No person, however, shall remove, or cause to be removed, from any vinegar factory or place where vinegar is made, any vinegar or other fluid or material containing a greater proportion than 2 per centum of proof spirits, and shall subject the person or persons guilty of removing the same to the punishment provided for any violation of this section.

And the sections 2827, 2828, and 2830 shall apply to all premises whereon vinegar is manufactured, to all manufacturers of vinegar and their workmen or other persons employed by them. 53 Stat. 319.

Section 2831, U.S.C., SIGNS OF DISTILLERS, RECTIFIERS, AND WHOLESALE LIQUOR DEALERS.

Every person engaged in distilling or rectifying spirits, and every wholesale liquor dealer, shall place and keep conspicuously on the outside of the place of such business a sign, exhibiting in plain and legible letters, not less than three inches in length, painted in oil colors or gilded, and of a proper and proportionate width, the name or firm of the distiller, rectifier, or wholesale dealer, with the words: "Registered distillery," "rectifier of spirits," or "wholesale liquor dealer," as the case may be. Every person who violates the foregoing provision by negligence or refusal, or otherwise, shall pay a penalty of $500.

And every person, other than a rectifier or wholesale liquor dealer who has paid the special tax, or a distiller who has given bond as required by law, who puts up or keeps up the sign required by this section, or any sign indicating that he may lawfully carry on the business of a distiller, rectifier, or wholesale liquor dealer, shall forfeit

and pay $1,000, and shall be imprisoned not less than one month nor more than six months. And every person who works in any distillery, rectifying establishment, or wholesale liquor store, on which no sign is placed and kept, as hereinbefore provided; and every person who knowingly receives at, carries or conveys any distilled spirits to or from, any such distillery, rectifying establishment, warehouse, or store, or who knowingly carries and delivers any grain, molasses, or other raw material to any distillery on which such sign is not placed and kept, shall forfeit all horses, carts, drays, wagons, or other vehicle or animal used in carrying or conveying such property aforesaid, and shall be fined not less than $100 nor more than $1,000, or be imprisoned not less than one month nor more than six months. 53 Stat. 318.

Section 2803, U.S.C., STAMPS FOR CONTAINERS OF DISTILLED SPIRITS.

(a) *Requirements.* No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed on such spirits. The provisions of this section shall not apply to—

(1) Distilled spirits placed in a container for immediate consumption on the premises or for preparation for such consumption;

(2) Distilled spirits in bond or in customs custody;

(3) Distilled spirits in immediate containers required to be stamped under existing law;

(4) Distilled spirits in actual process of rectification, blending, or bottling, or in actual use in processes of manufacture;

(5) Distilled spirits on which no internal revenue tax is required to be paid;

(6) Distilled spirits not intended for sale or for use in the manufacture or production of any article intended for sale; or

(7) Any regularly established common carrier receiving, transporting, delivering, or holding for transportation or delivery distilled spirits in the ordinary course of its business as a common carrier.

APPENDIX B.

OPINION.

(Omitting Caption and Formal Parts.)

McIntire was charged by an indictment containing five counts. The first count charged that McIntire and five others had in their possession and custody and under their control an unregistered still and distilling apparatus for the production of spiritous liquors, in violation of 26 USCA 2810. The second count charged the same defendants with carrying on the business of a distiller of spiritous liquors without having given the bond required by 26 USCA 2814. The third count charged the same defendants with working at a distillery for the production of spiritous liquors upon which no sign bearing the words "Registered Distillery" was posted and kept, as required by 26 USCA 2831. The fourth count charged the same defendants with making fermented mash fit for distillation and for the production of spiritous liquors on premises other than a distillery duly authorized by law, in violation of 26 USCA 2834. The fifth count charged the same defendants with possession of 16 gallons of distilled spirits, the immediate container of which did not have affixed thereto a stamp denoting the

quantity of distilled spirits contained therein and evidencing the payment of all internal revenue taxes imposed on such spirits, in violation of 26 USCA 2803.

McIntire was convicted and sentenced and has appealed.

On February 19, 1953, Sypert, Sheriff, and Marlow and Rector, Deputy Sheriffs of Muskogee County, Oklahoma, and Etchison and Green, officers of the City Police Department of Muskogee, Oklahoma, seized a large distillery in a farm house located west of Muskogee, Oklahoma. The farm house contained five downstairs rooms, one upstairs room, and a front porch. It was situated approximately one-fourth mile from U. S. Highway 62, near a section line road a side road extended to the still house, a distance of approximately 100 yards. The distillery was set up and operating at the time of seizure. It had a daily capacity of approximately 110 gallons of distilled spirits. At the still house there were 77 barrels containing approximately 4200 gallons of mash and 13 gallons of whiskey in unstamped containers. Two of the defendants charged in the indictment, Ellison and Mitchell, were arrested by the officers at the time of the seizure. Mitchell told the officers that other persons were involved, but refused to give their names. Green took Ellison and Mitchell to the Muskogee County Jail and then returned to the still house. The officers remained at the still house. About 10:30 p. m., February 19, 1953, the officers saw an automobile stop on the U. S. Highway, near its junction with the section line road leading to the still house.

The driver of the automobile, later ascertained to be McIntire, turned off the headlights of the automobile, then turned into the section line road, proceeded to the side road leading to the still house, turned into the side road and approached the still house. Upon reaching the still house

McIntire backed the automobile, which was a Navy surplus pick-up truck, sometimes called a jeep, up to the front porch. The officers heard him drop the end-gate and commence unloading cartons from the jeep onto the front porch. McIntire then started to open the door into the still house from the front porch. Thereupon, the officers arrested McIntire. Two of the cartons which had been unloaded onto the front porch contained empty gallon glass jugs. The officers also observed several additional cartons in the jeep which contained empty gallon glass jugs. Such jugs are commonly used as containers for illicit whiskey.

McIntire interposed a motion to suppress the evidence, that is, the cartons and the gallon jugs which the officers seized following the arrest of McIntire, on the ground that they were obtained through an unlawful search and seizure of the jeep. The trial court overruled the motion to suppress. The motion to suppress was heard on December 1, 1953.

At the trial McIntire made an offer of additional evidence to establish that Officers Etchison and Green had on several occasions found stills in the vicinity of Muskogee, and had turned the cases over to Federal officers for prosecution. The trial court rejected the offer on the ground it presented a collateral issue, and that it should not stop the orderly trial of the case to inquire into such issue.

It is well settled that a search without a search warrant is justifiable where it is incident to a lawful arrest, if it is reasonable and made in good faith; and that a seizure on such a search of evidence related to the crime and instruments of its commission is permissible.

A peace officer may arrest without a warrant one believed by the officer, upon reasonable cause, to have been guilty of a felony, and he may arrest without a warrant one guilty of a misdemeanor, if committed in his presence. In order to warrant an arrest without a warrant of one be-

lieved by the officer to have been guilty of a felony, the facts and circumstances within the knowledge of the officer, or of which he had reasonable, trustworthy information, must be sufficient to warrant a man of reasonable caution in believing that the offense had been committed.

Here, the officers knew that the distillation of spiritous liquors was being unlawfully conducted at the still house. They had reasonable cause to believe that persons other than those arrested at the time of the seizure of the distilling apparatus were involved. McIntire stealthily approached the still house on a dark night with the lights of his car turned off, backed up to the front porch, unloaded part of the cartons from the jeep and then started to open the door and enter the still house. The still house was used solely for the carrying on of the unlawful distilling operations. It was a reasonable deduction, under the circumstances, that the gallon jugs brought to the still house and partly unloaded onto the front porch were to be used in connection with such unlawful distilling operations. The officers had reasonable cause to believe from those facts and circumstances that McIntire, in bringing the gallon jugs to the still house and unloading them onto the front porch, was then aiding and assisting in the unlawful operation of the distilling of spiritous liquors.

The manufacture of the mash, the possession of the distilling apparatus, and the manufacture of distilled spirits were misdemeanors under the laws of Oklahoma. 37 Okl. St. Ann., 51, 52, 53, and 57.

In Oklahoma all persons concerned in the commission of a crime, whether it be a felony or misdemeanor, or whether they directly commit the act of constituting the offense, or aid and abet in its commission, are principals. 21 Okl. St. Ann. 172.

There can be no doubt under the law of Oklahoma that the Sheriff, Deputy Sheriff, and police officers were authorized to arrest McIntire.

The search and seizure of the cartons on the porch and in the jeep was an incident to a lawful arrest and was reasonable and made in good faith. Accordingly, we conclude that the search and seizure was lawful and that the motion to suppress was properly denied. Hence, it becomes unnecessary to determine whether, under the facts, there was cooperation in the search and seizure, among state and city officers and Federal officers, or that there was a general understanding and common practice among the state, city and Federal officers that the Federal officers would adopt and prosecute in the Federal courts offenses discovered by the state and city officers.

The court denied McIntire's motions for a judgment of acquittal, made at the close of the Government's testimony and at the close of all the evidence in the case. While the denial of those motions is included in McIntire's statement of points, it is not argued in his brief. Suffice it to say that there was ample evidence to sustain the verdicts of guilty.

Affirmed.

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331705—55

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 557

PERCY MCINTIRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 15–19) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 15, 1954 (R. 84), and a petition for rehearing was denied on December 27, 1954 (R. 95). The petition for a writ of certiorari was filed on January 21, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether state law-enforcement officers while searching distillery premises under a valid search warrant were justified in arresting petitioner and searching his vehicle without additional warrants when he arrived on the scene under circumstances strongly indicating he was then and there occupied in the business of the illegal distillery.

2. Whether, even if the search were illegal, the federal rule of suppression applies to evidence procured solely by local law-enforcement officers acting under their own authority.

STATEMENT

After a jury trial, petitioner was convicted under each count of a five-count indictment (R. 2–3) charging various violations of the internal revenue laws relating to the keeping of a distillery and the distillation of spiritous liquors.[1] The judgment of conviction was unanimously affirmed on appeal (Pet. 15–19).

Petitioner does not challenge the sufficiency of the evidence to support his conviction but directs

[1] Petitioner was sentenced to 2 years' imprisonment on each of counts one and two, 6 months on each of counts three and four, and 3 years on count five, all terms of imprisonment to run concurrently with each other. In addition, he was fined $100 on each of counts one and two, and $500 on count four, the fines on counts one and two, and $200 of the fine on count four to stand "committed," the remaining $300 of the fine on count four to be placed on execution or until otherwise discharged as provided by law (R. 4–5).

his allegations of error to the overruling, after hearing, of his motion to suppress certain evidence made prior to trial (R. 3–4, 6–28), which was renewed on the trial (R. 37, 40–41). The evidence on this issue may be summarized as follows:

On February 19, 1953, about 3 o'clock in the afternoon, the sheriff of Muskogee County, Oklahoma, accompanied by two of his deputies and two city police, entered a country house several miles outside the city of Muskogee (R. 9, 16, 29) under the authority of a search warrant which they had with them (R. 27, 29, 35). They found an unregistered, unposted still in full operation together with untaxed liquor, quantities of mash, and other paraphernalia of the distillery trade (R. 27, 29, 35, 42–43). They placed two persons, Ellison and Mitchell, who were present in the house, under arrest (R. 30, 36). The officers then waited.

About 7:30 o'clock that evening, at a time when it was dark outside and raining, some of the officers watching from a window saw a truck, or what was more properly referred to in the evidence as an army-type weapons carrier, turn off the state highway into the approach road, and when still some distance from the house, turn its headlights off. The officers heard the truck back up to the porch of the house and then heard the tailgate of the vehicle lowered on to the porch. They also heard a sound as though something

was being unloaded on the porch (R. 8, 13, 16, 18, 22, 26–28, 36–37, 43–44). Then, while the motor of the vehicle was still running, and the lights were still off, the officers heard petitioner ascend to the porch near the door. The officers opened the front door and placed him under arrest (R. 8–9, 16, 37). Armed with flashlights the officers could see from the porch large cartons in the bed of the truck which, on search, turned out to contain empty gallon jugs such as are used in carrying liquor (R. 23–24; see also: R. 10, 19).[2] There were also some cartons of jugs on the porch apparently unloaded by petitioner at the time he put the tailgate down (R. 44).

Following his arrest, petitioner told the county and city officers that (R. 44) "the outfit didn't belong to him, that it belonged to a fellow that was sick." He then agreed to lead the officers to this man in Tulsa, Oklahoma. He aided the officers in apprehending George Montgomery, a co-owner of the distillery (R. 44, 56–57), who testified on the trial that petitioner owned one-third interest in the illegal business, had shared in setting it up, and helped operate it (R. 50–52).

The day following, the local officers, after consultation with federal authorities, turned the case over to them (R. 19, 20–21). There had been no

[2] The truck had a boom and winch mounted on it for lifting heavy weights (R. 41–42, 54). It was developed on the trial that petitioner used this vehicle for hauling liquor from the distillery (R. 56).

previous participation by federal authorities in the case (R. 19–20).

ARGUMENT

Petitioner does not dispute the fact that at the time of his arrest at the doorway of the distillery premises, local law-enforcement officers were engaged in making a search of those premises pursuant to a valid search warrant (see, e. g., R. 12). His contention is in essence that despite the circumstances under which he arrived on the scene the local officers had no authority to either arrest him or search his truck.

Even if federal officers had arrested petitioner and searched his vehicle, there would still be no basis to support the motion to suppress. The officers admittedly had found a distillery in full operation while making a search of the premises pursuant to a valid search warrant. While the search was in progress petitioner drove his truck up to the premises under circumstances which would justify a belief that he was engaged in the illegal enterprise. Although the night was dark and raining he turned the truck lights off as he approached the house. He then backed the truck up to the porch, and with the motor still running, lowered the tailgate and unloaded some boxes on the porch. Then he approached the door as though to enter. The officers clearly had probable cause to believe that an offense was being committed in their presence, as in fact it was, and

they were therefore entitled to make the arrest.[3] After finding the unloaded boxes and ascertaining with their flashlights that other boxes were stored in the bed of the truck, the officers were justified in making the search of the truck. Finding petitioner in *flagrante delicto* they had neither time nor opportunity to procure additional warrants. The search was clearly valid under federal law. *Brinegar* v. *United States*, 338 U. S. 160; *Scher* v. *United States*, 305 U. S. 251; *Carroll* v. *United States*, 267 U. S. 132. See also: *Browner* v. *United States*, 215 F. 2d 753 (C. A. 6); *United States* v. *Bianco*, 189 F. 2d 716 (C. A. 3).[4]

Moreover, petitioner made no showing that federal officers were involved in the arrest of petitioner or the search of his truck. The trial court was amply justified in finding that the case was not turned over to federal authorities until the day following the events in question and that federal officers had taken no part in the case up to that time. Petitioner's speculative protestations to the

[3] Since the officers were justified in believing that the offense was being committed in their presence, it is immaterial that, under Oklahoma laws, liquor offenses are misdemeanors (see Pet. 4–5). Moreover, under the circumstances, the officers clearly had reason to believe that petitioner had committed a felony under federal law and could arrest him for such offense.

[4] The evidence relating to the search of the truck which petitioner contends should have been suppressed was in fact introduced into the case by his own counsel in the cross-examination of the first government witness (R. 31–32). Cf. *Crawford* v. *United States*, 198 F. 2d 976, 979 (C. A. D. C.).

contrary are supported by no evidence of record. This Court has declared that in these circumstances the federal rule of suppression would not be applicable even if the search had been illegal. *Byars* v. *United States,* 273 U. S. 28, 33.

CONCLUSION

The decision of the court below is correct and consistent with established principles of law enunciated by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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